1990

State of Utah v. Reid H. Ellis : Brief in Opposition to Certiorari

Utah Supreme Court

Glenn J. Ellis; Attorney for Petitioner.
R. Paul Van Dam; Attorney General; David B. Thompson; Assistant Attorney General; Attorneys for Respondent.

UTAH SUPREME COURT

BRIEF

~~900209~~ 900172

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 900172
v.	:	
REID H. ELLIS,	:	Category No. 13
Defendant-Petitioner.	:	

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

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R. PAUL VAN DAM (3312)
Attorney General
DAVID B. THOMPSON (4159)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

Attorneys for Respondent

GLENN J. ELLIS
121 West State Street
Hurricane, Utah 84737

Attorney for Petitioner

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236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

Attorneys for Respondent

GLENN J. ELLIS
121 West State Street
Hurricane, Utah 84737

Attorney for Petitioner

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QUESTIONS PRESENTED FOR REVIEW

Three issues are presented by petitioner for review:[1]

1. Did the court of appeals erroneously reject petitioner's claim that the trial court should have suppressed certain evidence on the ground that petitioner's arrest was illegal?

2. Did the court of appeals erroneously reject petitioner's claim that the trial court should have suppressed certain evidence on the ground that it was illegally seized without a warrant?

3. Did the court of appeals erroneously reject petitioner's claim that the trial court allowed an unlawful amendment to the information under which petitioner was charged?

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[1] This brief in opposition is submitted pursuant to a request for a response to the petitioner's petition by the Court. The attorney general had previously filed a letter, dated May 4, 1990, which indicated that the State waived the right to file a brief in opposition to the petition. See Utah R. App. P. 50(d).

OPINION BELOW

The court of appeals affirmed petitioner's convictions by "Order of Affirmance" issued pursuant to rule 31, Utah Rules of Appellate Procedure, on March 15, 1990 (a copy of that order is contained in Appendix A).

JURISDICTION OF THIS COURT

This Court has jurisdiction to consider this petition under Utah Code Ann. § 78-2-2(3)(a) (Supp. 1990).

STATEMENT OF THE CASE

Defendant, Reid H. Ellis, was charged by information with assault on a peace officer, a class A misdemeanor, under Utah Code Ann. § 76-5-102.4 (1990); retail theft, a class B misdemeanor, under Utah Code Ann. § 76-6-602 (1990); and unlawful possession of alcohol by a minor, a class B misdemeanor, under Utah Code Ann. § 32A-12-13(1) (1986). After a jury trial, he was found guilty as charged. The trial court sentenced petitioner to 180 days in jail, fined him $350, and ordered him to pay restitution. The court stayed execution of sentence and placed petitioner on six months' probation, the conditions of which included service of jail time.

Petitioner appealed his convictions to the Utah Court of Appeals, which affirmed without opinion under rule 31, Utah Rules of Appellate Procedure.

STATEMENT OF FACTS

Petitioner's recitation of the facts is quite different from that presented by the Rich County Attorney to the court of

appeals.[2] Because the attorney general has not had an opportunity to review independently the record in this case, it will rely on the county attorney's recitation of the facts as an accurate statement of the evidence presented at trial. See Br. of Resp. at 2-8 (a copy of the county attorney's brief, in its entirety, is contained in Appendix B). It must be presumed that, in light of its affirmance of petitioner's convictions under rule 31, Utah Rules of Appellate Procedure, the court of appeals had no significant disagreement with that recitation of the facts after its review of the record.

ARGUMENT

PETITIONER HAS NOT PRESENTED ANY SUBSTANTIAL ISSUES WHICH WARRANT REVIEW BY THIS COURT.

Petitioner argues that the trial court should have suppressed certain evidence because he was illegally arrested and the arresting officer conducted an illegal warrantless search, and that the information filed against him was unlawfully amended to charge more serious crimes. Therefore, he asserts, the court of appeals erred in affirming his convictions.

Although this case admittedly is one where the police appear to have created a more volatile situation than was necessary to effective law enforcement and thus were probably

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[2] Because this case originated in the circuit court, the county attorney, who prosecuted the case at trial, represented the State on appeal in the court of appeals pursuant to Utah Code Ann. § 78-4-11 (1987). In accordance with its statutory obligation to represent the State in this Court, see Utah Code Ann. § 67-5-1(1) (Supp. 1990), the attorney general appears on this response to the petition for writ of certiorari.

guilty of poor judgment,[3] the arguments by the county attorney to the court of appeals on the issues identified by petitioner in the instant petition, which the court of appeals presumably accepted, are legally supportable. See Br. of Resp. at 14-20. And while the fourth amendment issues may be somewhat close, the court of appeals' decision is not inconsistent with decisions of this Court or the United States Supreme Court. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent exception to warrant requirement); State v. Cole, 674 P.2d 119, 125 (Utah 1983) (standard for determining probable cause for arrest); Utah R. App. P. 46(b). In sum, petitioner has not presented any substantial issues that warrant review by this Court under rule 46, Utah Rules of Appellate Procedure.

CONCLUSION

Based on the foregoing arguments, the Court should deny the petition for writ of certiorari.

RESPECTFULLY submitted this 28th day of September, 1990.

R. PAUL VAN DAM
Attorney General

David B. Thompson
DAVID B. THOMPSON
Assistant Attorney General

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[3] Indeed, the trial court was prompted to say:

> I have never, in all my years on the bench, spent as much time considering the trial, the hearing and stayed awake at night wondering what would be appropriate here, because I do think that this matter got out of hand, it

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Opposition were mailed, postage prepaid, to Glenn J. Ellis, Attorney for Petitioner, 121 West State Street, Hurricane, Utah 84737, this 28th day of September, 1990.

David B. Thompson

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[3] Cont. would re-examine [sic] their procedures and determine why the matter went that far.

(See Appendix ii attached to petitioner's petition.)

APPENDICES

APPENDIX A

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	
	)	
Plaintiff and Respondent,	)	ORDER OF AFFIRMANCE
	)	
v.	)	Case No. 890366-CA
	)	
Reid H. Ellis,	)	
	)	
Defendant and Appellant.	)	

Before Garff, Billings, and Davidson (On Rule 31 Panel).

This matter is before the court pursuant to R. Utah Ct. App. 31.

IT IS HEREBY ORDERED THAT the judgment is affirmed.

DATED this 15th day of March, 1990.

FOR THE COURT:

Regnal W. Garff, Judge

APPENDIX B

IN THE UTAH COURT OF APPEALS, STATE OF UTAH

STATE OF UTAH	*	CASE NO. 890366-CA
Plaintiff and Respondent	*	Priority - 3
vs.	*	
REED ELLIS	*	
Defendant and Appellant	*	

BRIEF OF RESPONDENT-PLAINTIFF

APPEAL FROM A DENIAL OF A MOTION TO SUPPRESS
APPEAL FROM A DENIAL OF A MOTION FOR CHANGE OF VENUE
AND APPEAL FROM A JURY VERDICT ON THREE COUNTS

FROM THE FIRST CIRCUIT COURT, RICH COUNTY
THE HONORABLE ROBERT W. DAINES, JUDGE

GEORGE W. PRESTON
Attorney for Respondent
Rich County Attorney
31 Federal Avenue
Logan, Utah 84321

GLEN J. ELLIS
Attorney for Appellant
60 East 100 South #102
P.O. Box 1097
Provo, Utah 84603

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS BELOW

This Court has jurisdiction of this appeal under the provisions of 78-2a-3(2)(d) and Rule 3 of the rules of the Utah Court of Appeals.

The Defendant was arrested on October 14, 1988, north of Laketown, Rich County, Utah, for the offenses charged herein. Upon his arrest written citations were issued to the Justices Court of Rich County and copies delivered to the Defendant. Informations were thereafter filed by the County Attorney of Rich County in the Circuit Court. Defendant filed a Motion to Suppress which was denied by the Court and the matter was tried before a jury. Defendant was found guilty on all counts by the jury on the 11th day of April, 1989. The Defendant appeals from jury verdict, denial of his Motion to Suppress and denial of a Motion to Change Venue.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Court erred in refusing to grant Defendant's Motion to Change Venue.

2. Whether or not the filing of an Information after citations had been filed constituted changing or amending of charges against Defendant.

3. Whether the officer arrested the Defendant illegally, i.e., without a warrant for misdemeanor occurring outside of his

presence or as stated by the State whether the officer had probable cause to make an arrest of the Defendant.

4. Whether the Court erred in failing to suppress evidence.

5. Whether or not the Court erred denying a motion to arrest the jury verdict for doubt.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES & CASES

1. Change of Venue Issue. Section 77-35-29(e)(f) attached hereto as Appendix 1.

2. With reference to the Amendment of charges, see Section 77-7-18, Appendix 2; Section 77-7-21, Appendix 3.

3. Relating to failure of the Trial Court to grant Defendant's motion to arrest judgment. See Section 77-35-23, Rule 23 Arrest of Judgment. See Appendix 4.

STATEMENT OF THE CASE

I.

A. Nature of the Proceedings Below.

The Defendant was arrested on October 14, 1988. Upon his arrest he was taken to the Rich County Sheriff's Office. At that time written citations were issued. Copies were delivered to the Defendant. Rich County Attorney made a Motion to Transfer to the Circuit Court which was granted by the Justice of the Peace. Informations were filed in the Circuit Court of Rich County. Defendant filed an "Appearance, Plea, and Waiver of Service", Defendant filed a Motion to Suppress and a Motion to Change Venue. Each was denied by the Court. The matter was tried before a jury.

Defendant thereafter made a motion to arrest judgment which was denied by the court. Defendant appealed to the Court of Appeals.

B. Statement of Facts.

The Defendant Reid H. Ellis, a companion Mark T. LeFevre and two minors, Lee Ellis, brother of the Defendant and Shane Miller were first observed by Dee Hodges, who observed their vehicle pull in front of his service station in Laketown, Utah. (Tr. 37) He reported that one of the four went inside, then came back to the front door and reported to the others in the car that they did not have any Miller's brand of beer. (Tr. 37) His son Dennis Hodges reported that one of the boys attempted to buy a 4-pack of coolers (an alcoholic beverage), he had no identification and by reason thereof Hodges refused to sell him the alcoholic beverage. (Tr. 40) Dennis Hodges identified the individual as Mark LeFevre. The four boys, in the same vehicle, then proceeded one block south to the Old Rock Store situated in Laketown, Utah, where Renee Earley observed the four of them come into the store. They were milling around the store including the back of the store where she kept cold beer. (Tr. 49) She identified the Defendant as one of the boys in the store on the first occasion. (Tr. 49) They bought a few things in the store and stayed approximately 5 minutes. (Tr. 50) The vehicle with the four boys came back a second time, three of the four came in the store. (Tr 51) The proprietor of the store became suspicious. (Tr. 51) Mark LeFevre had a coat in his hand on the second visit to the store. (Tr. 53) Because the store owner was nervous she asked her son to stand in the aisle and watch

the three boys. The boys then departed the store. After her son left the store, the boys came back a third time. (Tr. 61) The two juveniles entered the store with Mark LeFevre. (Tr. 62) LeFevre had a coat in his hand and went to the back of the store where the beer cooler was located. (Tr. 62 - 63) The two juveniles went to the penny candy counter and requested that the proprietor count out 110 watermelon slices. (Tr. 64) During the course of counting out the candy, the store owner observed Mark LeFevre departing the store with what she described as a "square coat" in his hand. She described the size of the square package beneath the coat as the size of a 12-pack of diapers. (Tr. 64) Because of the unusual appearance of the "square coat" she identified the car, the number on the license plate and bumper stickers of rock bands on the back of the car. (Tr. 67) The store proprietor went to the cooler and found a 12-pack of beer missing from the store. (Tr. 68)

She called the Sheriff of Rich County on two separate occasions and reported what she had observed to the Sheriff. The Sheriff received the call from Renee Earley at approximately 11 o'clock in the morning. He was given a description of the events which Renee Earley had observed. (Tr. 108 -110). Acting upon the information that he had received from Renee Earley, the Sheriff went to the Southeast shore of Bear Lake where he identified a blue car in front of one of the summer residences that had bumper stickers across the back. The license number was the same as the one reported to him by Renee Earley. (Tr. 111) The Sheriff got out of his car and went to the door of the summer residence where

he knocked on the door. A voice within the cabin indicated that the door did not work and to go around to the other side of cabin. (Tr. 113) The Sheriff went around to another door where he had a conversation with Reid Ellis outside of the summer residence. (Tr. 113) The Sheriff identified himself as a police officer, showed Ellis his identification and indicated to Reid Ellis that there had been a commotion in a couple of the stores in town and that some beer had been taken from one of the stores. He then asked Reid Ellis if he could look around. (Tr. 114) The Sheriff testified that the Defendant said he didn't have any beer and the Sheriff was welcome to look around. Defendant admitted that he told the officer he could look around. (Tr. 311) The Sheriff then testified that the pair walked into the kitchen area of the summer residence where the Defendant opened cupboards and the refrigerator. (Tr. 115) The Defendant admitted that he opened the cupboards and refrigerator for the officer. (Tr. 312) The officer then testified that as he and the Defendant were in the kitchen, Mark LeFevre walked into the kitchen. (Tr. 115) The officer smelled alcohol on LeFevre's breath and asked him to blow in his face (Tr. 116) and the officer smelled alcoholic beverage on his breath. (Tr. 116) Turning to Reid Ellis the officer asked him if he had been drinking whereupon Ellis said no and the officer repeated the request to blow in his face. The officer smelled alcohol on his breath. (Tr. 117)

Upon hearing noises in another part of the cabin, the officer asked if he could talk to the other boys. Defendant replied yes. (Tr. 118) Reid Ellis led the officer around to another section of the cabin which required an exit from the kitchen area, a walk around a path and an entrance into a bedroom area. As the officer stepped into the bedroom area he observed a can of beer on the floor. (Tr 119) The officer had asked prior to that time who was in charge of the cabin and the Defendant indicated that he was. (Tr. 118) The Defendant and the other three then indicated they were all under the age of 21. (Tr. 120)

At the time of trial the officer articulated that, at that point, he had the following facts: he observed the same car as Renee Earley had described parked at the summer residence; two of the boys, both under age 21, Mark LeFevre and the Defendant Reid Ellis had alcohol on their breaths; the can of beer in the cabin was of the same type as reported stolen by the owner of the Old Rock Store; no one in the room was old enough to drink or possess beer and that there was being committed in the officer's presence, possession of alcohol and consumption of alcohol by minors. (32A-12-13 UCA) (Tr. 120)

The officer thereafter placed Reid Ellis under arrest and cuffed one hand. (Tr. 121) A struggle ensued. (Tr. 123) Mark LeFevre and Lee Ellis stood up from a seated position and positioned themselves behind the Sheriff. (Tr 123) The Sheriff then drew his hand gun to protect himself because he "didn't want to end up wrestling over the gun". (Tr. 123) The Sheriff,

realizing the situation, grabbed the loose hand cuff and attempted to drag Defendant towards the door, put the gun back under his belt, picked up the can of beer and got out of the doorway holding onto the hand cuff. (Tr. 124) The Defendant at that time was kicking at the officer, struggling and attempting to pull away. The other three boys grabbed the Officer's shirt, attempted to pull him back into the cabin and attempted to pry his fingers off of the can of beer the officer was preserving as evidence. (Tr. 125) The officer then released Reid Ellis, returned to his car where he radioed for help. Upon the arrival of other officers, the two juveniles surrendered to the officers where it was noted that Levi Miller, a juvenile had a strong odor of alcohol on his breath. (Tr. 130) During the next several minutes the officers made many attempts to get the voluntary cooperation of the Defendant and Mark LeFevre without success. The officers ultimately entered the cabin and arrested the Defendant. The Sheriff describes the Defendant as very combative, irrational and was not using good judgment. (Tr. 136) At the time of the arrest the officer again smelled alcohol on the breath of the Defendant. (Tr. 134) The Sheriff's recognition of alcohol on the breath of Defendant Ellis and his companion Mark LeFevre was verified by a State Park Officer Brian House. (Tr. 213) Officer Charlie Young of the Utah Highway Patrol testified that he observed the Defendant Ellis at the time of the arrest swing at the Sheriff or Officer Gregory with the hand that had a hand cuff attached to it. His statement at Tr. 218 is as follows:

> "I don't remember if it was Dan or Gregory that grabbed his hand but one of them was loose and Reid Ellis took a swing at Officer Gregory the one with the hand cuff on it. It was loose and swinging and they were able to restrain him and get him out of the door and they cuffed him outside on the patio ".

Relative to the issue of the consensual search, Lee Ellis the Defendant's brother, stated that he did not know if anyone said that the Sheriff could come inside the building and look around, but while the Sheriff was outside he heard Defendant say to the Sheriff go ahead and look around at which the Sheriff replied, "Let's go inside". (Tr. 269)

The Defendant on the stand admitted telling the officer that he could look around. (Tr. 311) Admitted voluntarily opening cupboards and refrigerator for the officer while inside the building. (Tr. 312)

When asked if the Sheriff of Rich County had showed him his badge, the Defendant replied, "Well, the Lone Ranger has one of those". (Tr. 318) Defendant also at trial (Tr. 319) testified as follows:

> Like I thought, he was one of those people who dresses up like a cop and then rapes people. I saw it on TV and I don't want to be a victim. (Tr. 319)

The jury convicted the Defendant of all charges. Prior to sentencing Defendant made a motion to arrest the judgment which was denied by the Court and the Defendant was thereafter sentenced. Defendant appeals from the Judgment of Conviction.

II.

SUMMARY OF ARGUMENTS

POINT I:

THE COURT PROPERLY DENIED DEFENDANT'S MOTION TO CHANGE VENUE AS THE SUPPORTING AFFIDAVIT FAILED TO MEET THE CRITERIA ESTABLISHED IN STATE V. JAMES. See the affidavits at Appendix 5.

POINT II:

ALTHOUGH THE DEFENDANT CLAIMS THE COURT ALLOWED AN AMENDMENT OF THE CHARGES AGAINST THE DEFENDANT THERE WAS IN FACT NO SUCH AMENDMENT. FOLLOWING THE ISSUANCE OF A CITATION AND AN ENTRY OF A PLEA OF NOT GUILTY AN INFORMATION MUST BE FILED. THE DEFENDANT WAS, IN FACT, TRIED UPON THE INFORMATION WITHOUT AMENDMENT THAT WAS REQUIRED TO BE FILED UNDER THE STATUTES OF THE STATE OF UTAH. See 77-7-21.

POINT III:

ALTHOUGH DEFENDANT CLAIMS HE WAS ILLEGALLY ARRESTED WITHOUT A WARRANT FOR A MISDEMEANOR COMMITTED OUT OF THE OFFICER'S PRESENCE, THE FACTS AS ARTICULATED BY THE OFFICER SHOW THAT CONSENT TO ENTER THE DEFENDANT'S RESIDENCE WAS VOLUNTARILY GIVEN. DEFENDANT HAD THE SMELL OF ALCOHOL ON HIS BREATH AND WAS IN POSSESSION OF ALCOHOL WHICH WERE MISDEMEANORS COMMITTED IN THE OFFICER'S PRESENCE FOR WHICH HE WAS ENTITLED TO ARREST THE DEFENDANT WITHOUT A WARRANT.

POINT IV:

THE TRIAL COURT FOUND AND THE EVIDENCE REFLECTS THAT THERE WAS CONSENT GIVEN BY THE DEFENDANT TO ENTER THE RESIDENCE. UPON ENTRY OF THE RESIDENCE THE OFFICER SAW IN PLAIN VIEW A CAN OF BEER WHICH WAS SEIZED BY THE SHERIFF. NONE OF THE OCCUPANTS WERE OVER THE AGE OF 21 AND THE BEER MATCHED THE DESCRIPTION OF THAT STOLEN FROM THE OLD ROCK STORE IN LAKETOWN APPROXIMATELY 2 HOURS PRIOR TO ITS SEIZURE.

POINT V:

THE JURY FOUND SUFFICIENT EVIDENCE IN THE RECORD FOR THE CONVICTION OF THE DEFENDANT ON ALL COUNTS, PARTICULARLY THAT OF THEFT WHERE DEFENDANT AS THE DRIVER OF THE VEHICLE FIRST WENT TO A SERVICE STATION WHERE AN OCCUPANT ATTEMPTED TO PURCHASE ALCOHOLIC BEVERAGES AND THEN DROVE TO THE OLD ROCK STORE WHERE ACHOLIC BEVERAGES WERE ULTIMATELY TAKEN BY ANOTHER. DEFENDANT HAD THE SMELL OF ALCOHOL ON HIS BREATH. HE EXHIBITED COMBATIVE AND IRRATIONAL BEHAVIOR EVIDENCING CONSUMPTION OF ALCOHOL.

ARGUMENT:

POINT I:

REID ELLIS CLAIMED THE COURT ERRED IN REFUSING TO GRANT A CHANGE OF VENUE

Appendix 5 which is attached to this brief contains the affidavits submitted by the Defendant in support of his motion for change of venue. By far the leading case in the area is the

Supreme Court case of the State of Utah v. James, 767 P.2d 549 (Utah 1989).

Using the James case as a yardstick it becomes immediately apparent that the Trial Court was "satisfied" in exercising its discretion not to grant the motion to change venue. The standard of review as set forth in the James case at page 15 is that the Appellate Court will not disturb the decision of the Trial Court unless there is an abuse of discretion shown.

The affidavit of Reid H. Ellis, the Defendant, states his opinion that during the hearing witnesses in the courtroom were observed by him and he drew the conclusion that those witnesses considered him guilty without a hearing. He secondly concludes that the residents of the community are biased against "summer people" without further substantiation.

The affidavit of Wayne Parry states that he is acquainted with Sheriff Cockayne and that he was subjected to harassment by the Sheriff and his deputies because he was a new comer in the community and he further alleges that the Sheriff and his deputies stopped his automobile, without probable cause, on 11 or 12 separate instances and accused the affiant of various criminal offenses.

Assuming every fact of the affidavit is true the affidavit concerns itself not with the prejudice of the community against outsiders but with the perceived prejudice of a sheriff against one outsider.

State v. James enumerates the elements necessary for a change of venue as follows:

(a) STANDING OF THE ACCUSED IN THE COMMUNITY. There is no evidence shown by the affidavits that this Defendant would receive an unfair trial by the members of the community because he was a member of a group known as "summer people". Absent a showing by affidavit that the members of the community are prejudiced against summer people, the Defendant's assertion must fail. State v. Gellatli, infra.

(b) THE SIZE OF THE COMMUNITY. Rich County is a small community with approximately 2200 residents. It has been stated that the smaller the community the more likely there will be a need for a change of venue. This rule has been applied to crimes of a heinous nature. This crime hardly fits that category.

In the James case, concern was given because a substantial number of the members of this community made an organized effort to help locate a missing child. In this case there is an isolated incident of a theft from a store which was essentially un-noticed in Rich County. There is no showing from the affidavits of any news publicity whatsoever. Upon voir dire of the jury some of the jury members had indicated that they heard of the case but it was in regards to the Sheriff and not in regards to the Defendant. (Tr. 21) Therefore, the size of the community as it relates to the Defendant is of little or no significance and the issue is not addressed in the affidavits of the Defendant.

(c) THE NATURE AND GRAVITY OF THE OFFENSE. This offense started out as a misdemeanor offense of theft of a 12-pack of beer. It gravitated into assault on a police officer by the Defendant's refusal to submit to arrest and to have the matter resolved in an orderly fashion at the Rich County Sheriff's Office. Nonetheless the nature and gravity of the offense is not such that it should be grounds for a change of venue.

(d) NATURE AND EXTENT OF PUBLICITY. There is no paper in Rich County. There was no publicity of this matter. Some members of the jury panel heard of this case but only through word of mouth. There was no evidence of a community feeling adverse to defendant. See State v. Gellatli, 449 P.2d 993 (Utah 1969) where the Court said that mere allegations that the whole community has knowledge of a crime by rumor particularly of a crime of the type herein involved is insufficient to indicate that prejudice or bias existed in the jurors who rendered the verdict.

(e) Voir Dire of the jury as evidenced by the transcript indicates that the jurors who had any preconceived opinions or had formed an opinion about the case were dismissed. A question to the jury panel was asked as follows:

> "Have any of you at this time formed an opinion as to the officer's conduct in this case, whether it be bad, good, improper or proper? In other words have you formed an opinion?" Answer by an unidentified juror indicated, " I haven't formed an opinion but I am struggling with the question".

The voir dire continued at page 21 of the transcript where the question was asked to the juror who was struggling with the

question. "Have you formed an opinion as to how this case should be decided from the information you have?" Answer: "Ya, I feel influenced". The juror was excused for cause. The pretrial bias shown by the jury was not adverse to the Defendant but appeared to be adverse to the Sheriff or his conduct in this case.

The voir dire of the jury indicates undeniably that there was no adverse reaction to the Defendant by the jury but that some members of the jury panel had reservations concerning the conduct of the Sheriff.

There is nothing in the record to indicate that the Court's decision denying the motion to change venue reflects an abuse of discretion by the Trial Court.

POINT II:

DEFENDANT CLAIMS THE COURT ERRED IN ALLOWING THE AMENDMENT OF THE CHARGES TO DIFFERENT AND MORE SERIOUS CHARGES.

Upon the arrest of the Defendant he was taken to the Rich County jail where citations were issued charging him with Class B Misdemeanor offenses. Upon review by the Rich County Attorney's Office, an information was filed in the Circuit Court alleging one Class A offense of assault on an officer and misdemeanor offenses. The Justice of the Peace transferred the matter to the Circuit Court.

The officer is entitled to issue citations for misdemeanor offenses. Section 77-7-18 states (See Appendix 2) that an officer in lieu of taking a person into custody ..... may issue and deliver a citation requiring a person subject to arrest or prosecution on

a misdemeanor or an infraction charge to appear at the Court of a magistrate before whom the person should be taken pursuant to law if the person had been arrested. A plea of "not guilty" was made by the Defendant requiring the filing of an Information. Section 77-7-21 provides that if a person pleads not guilty to an offense charged, an information shall be filed and the proceedings held in accordance with the rules of criminal procedure. See Appendix 3.

The Defendant on the 22nd day of November, 1988, entered a voluntary appearance in the Circuit Court, waived the service of summons and entered a plea of not guilty. (See Appendix 6)

The Information was not an amendment but an original document filed as required by statute to which this Defendant filed a voluntary appearance. See Appendix 6. The Defendant's contention that the State amended the charges is simply not substantiated by the record.

POINT III

DEFENDANT CLAIMS HE WAS ILLEGALLY ARRESTED, WITHOUT A WARRANT, FOR A MISDEMEANOR COMMITTED OUT OF THE OFFICER'S PRESENCE.

The Defendant was arrested by the Sheriff of Rich County at the Harding Haven cabin about two hours after a shoplifting incident at the Old Rock Store in Laketown. The Sheriff, in his testimony at the time of trial, states that at the time he drove to the south end of the lake he had a reasonable suspicion that a crime had been committed. (Tr. 141) The officer testified he had prior experience with alcohol related situations. (Tr. 107) Utah Bar Journal, October, 1989, Col. 1 p. 12. That reasonable

suspicion developed into probable cause when he smelled alcohol on the breath of Reid Ellis who was not then 21. (Tr. 141) The Sheriff thought it unusual that the Defendant was so quick to deny evidence of beer in the house and his conduct in opening cupboards and fridge for the inspection by the Sheriff. As the Defendant and the Sheriff entered the second portion of the cabin a beer can was observed of the same type as stolen from the Old Rock Store and by reason of the fact that all of the occupants of the cabin were under the age of 21 the Sheriff arrested that person in charge for the offenses committed in the Sheriff's presence.

The Defendant seems unwilling to concede the fact that there is credible evidence, believed by the Court and the jury, to the effect that the Sheriff of Rich County observed the commission of criminal offenses in his presence consisting of violations of Section 32A-12-13 UCA relating to minors in possession of alcohol and consumption of alcohol by persons under the age of 21.

State v. Johnson, 104 Adv. Rep. 34 decided by this Court on March 21, 1989 describes the three constitutionally permissible levels of police stops.

> (1) An officer may approach a citizen at any time and pose questions so long as the citizen is not detained against his will
> (2) An officer may seize a person if the officer has articulative suspicion that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop";
> (3) An officer may arrest a person if the officer has probable cause to believe that the offense has been committed or is being committed.

The Johnson case concluded that the case involved the level 2 stop.

The Officer, at the time he approached the cabin, had articulative suspicion having confirmed the description of the car and license number at the summer home. The officer then interviewed the Defendant, perceived the smell of alcohol on his breath, and found beer in the possession of the Defendant and others which was the same type as that recently stolen from the Old Rock Store.

The totality of the officer's testimony indicates that the officer articulated to the Court and jury the transition from articulative suspicion to probable cause to believe an offense was being committed in the presence of the officer.

77-7-2 UCA allows a police officer to make an arrest without a warrant if the offense is committed in his presence.

The Defendant asks this court to believe that the only offense committed was that of theft and the Defendant was arrested for a theft not committed in the presence of the officer. The facts of the case do not support Defendant's contention.

POINT IV

DID THE TRIAL COURT ERR IN FAILING TO SUPPRESS EVIDENCE?

Upon filing of the Information by the Rich County Attorney's Office, Defendant moved to suppress evidence. The Honorable Ted S. Perry, Judge of the circuit Court refused to grant the Defendant's Motion. At the suppression hearing the Court heard evidence from the Sheriff of Rich County to the effect that Defendant had consented to the search and had invited a search of

the area by opening cupboards and refrigerator doors for the Sheriff's inspection. (Hearing pg. 53) The Sheriff then detected the odor of alcohol on his breath and having determined that the Defendant had consumed alcohol recently, was under the age of 21, asked if he could talk to the other boys in the cabin. (Tr. 54) The Sheriff, upon entry into the second part of the cabin, observed the can of beer similar to that which was stolen.

In State v. Joseph P. Dorsey, 731 P.2d 1085 (Utah S.Ct. 1986) the court stated:

> Probable cause exists where "the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.

The Court further indicated:

> The validity of the probable cause determination is made from the objective standpoint of a "prudent, reasonable, cautious police officer ... guided by his experience and training." (Emphasis added)

Reviewing the facts of this case using the standard set forth in the Dorsey case, supra, the Officer's entitlement to search was as a result of consent. The record reflects unequivocally that the officer did not place the Defendant under arrest until he determined that the Defendant had consumed alcohol and found alcohol in the building where he resided.

The record reflects that there was consent given by the Defendant for the search of the property. Such consent purged the taint of any alleged unlawful search or seizure. In the case of

State of Utah v. Arroyo, 102 Ut. Adv. Rep. 34 decided February 15, 1989, this Court held as follows:

> To determine whether or not consent is voluntary we look at the totality of the circumstances to see if consent was in fact voluntarily given and not the result of duress or coercion expressed or implied.

This Court then concluded that although the original illegal stop was unconstitutional Arroyo subsequent voluntary consent purged the taint from the initial illegality and the motion to suppress should not have been granted.

Additional theories might also be argued to assure the constitutionality of the seizure such as exigent circumstances to seize property which might otherwise be destroyed, search incident to arrest and plain view. However the fact remains that the Trial Court at the suppression hearing and at the trial, had before them evidence of consent to search given by the Defendant and further evidence that there was in plain view an alcoholic beverage of the same type as stolen from the Old Rock Store, in the possession of the Defendant and others, gave the officer ability to seize the beer without a search warrant.

It's as interesting to note that at page 42 of a suppression transcript Mark LeFevre states that there was a can of beer that "Reid found in the wood box by the A frame" that someone had left there. However, at the time of the trial the Defendant testified as follows:

> Well, when I first - - when I - - when he showed - - when he goes what's this, you know, he said that, and I acted shocked. I didn't - - I hadn't seen it before, I didn't

> know where it was, or where it had come from, and I thought maybe some other relatives had left it there. I don't know.

The Sheriff is entitled to seize that which is in plain view. State v. Cole, 674 P.2d 119 (Utah 1983).

POINT V

DID THE COURT ERR IN DENYING DEFENDANT'S MOTION TO ARREST THE JUDGMENT AND CONVICTION?

See the case of State of Utah v. Larry W. Richards, decided by this Court on August 30, 1989 and found in 16 Utah Adv. Rep. at page 31. The facts of that case and the facts of this case are strikingly similar.

A. In the Richards case evidence of the assault upon the officer was controverted by the defendant. Notwithstanding, the Court concluded that the officer has probable cause to arrest Richards for assault, regardless of the fact that the jury did not believe that there was sufficient evidence to find him guilty.

The Court held that there was significant difference between the quantum of evidence required for conviction and that required to constitute probable cause for an arrest.

The standard of review in this case is that the Court review the evidence of a jury verdict and all inferences that can be drawn therefrom in the light most favorable to the verdict. State v. Tolman, 776 P.2d 422 (Utah Ct. of Appeals 1989); State v. Richards, supra.

B. The Defendant was charged with the offense of assault on a police officer on duty. Looking at the evidence most favorable

to the jury verdict, there is substantial evidence that Sheriff Cockayne identified himself to the Defendant verbally and by exhibiting a badge. Sheriff Cockayne described the assault. (Tr. 125) Officer Brian House describes an assault at page 218; Officer Gregory describes an assault at page 236.

C. Retail Theft. The Defendant was a driver of an automobile that went first to a service station where an attempt to purchase beer was made. The Defendant then drove the three occupants to the Old Rock Store where the Defendant entered the store on the first occasion. On the second and third occasions Defendant remained with the automobile. LeFevre committed an act of theft and the proceeds from that theft where taken to the automobile which the Defendant was driving. When the Sheriff went to Defendant's summer home, the Defendant had the odor of alcohol on his breath.

76-2-101 requires that the Defendant act intentionally with respect to each element of the offense. Section 76-2-103 defines intentionally as the conscious objective or desire to engage in the conduct or cause the result of the fact. Although the Defendant did not enter the store on the third occasion that fact does not negate criminal responsibility by reason of the fact that he apparently had knowledge and was aware of the conduct of others and the existing circumstances. His participation is shown by the fact that he had alcohol on his breath following the theft. Sub-section 2 of 76-2-103.

D. The jury found the Defendant guilty of unlawful possession of alcohol or possession by consumption.

In the record there appears evidence of the availability of alcohol to the Defendant, that he was under the age of 21 years and that he had alcohol on his breath as testified to by at least three officers following his arrest. The officer described the Defendant as combative, not very rational and not using good judgment which certainly is indication of the consumption of alcohol.

The jury being the finder of fact had before it sufficient facts upon which they could make a decision as to the guilt of the Defendant and it is incumbent upon this Court to review the evidence of a jury verdict and all inferences that can be drawn therefrom in the light most favorable to the verdict.

The Defendant would have this Court consider the actions taken against the other three individuals as a fact to determine whether or not the judgment should be set aside.

Section 76-2-203 provides as follows:

> In any prosecution in which the actor's criminal responsibility is based on the conduct of another, it is no defense; (2);
>
> (2) That the person for whose conduct the actor is criminally responsible has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or a different type of class of offense or is immune from prosecution.

There is credible evidence upon which the jury could base a finding of guilty to each of the three offenses charged.

SUMMARY

Reviewing the Defendant's brief the Defendant would like the reader to believe that an innocent young man's rights have been violated (Brief 12) by a overbearing sheriff (Brief 14) who induced the County Attorney to throw the book at the Defendant. (Brief 15) The Defendant during the course of the trial sought not to deal with the issue of the guilt or innocence of the Defendant but sought to try the officer. (Tr. 157) The Defendant's own conduct in front of the jury as evidenced at page 306, 318 and 319 of the transcript evidences a lack of credibility the jury in all likelihood considered in reaching their verdict.

The testimony of the officers shows there is ample evidence in the record upon which to sustain the conviction of the Defendant. For the foregoing reasons the State asks this Court to affirm the Trial Court's denial of the Motion to Suppress, affirm the Trial Court's denial of a Motion to Change Venue and affirm the jury's verdict and the Trial Court's judgment of conviction on three counts.

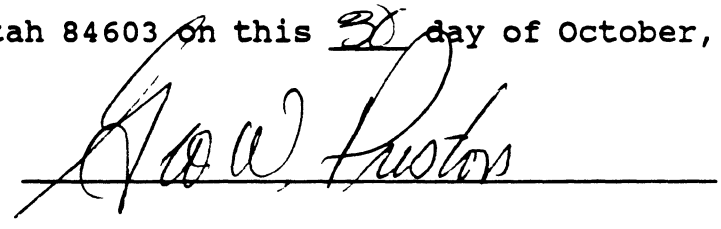
DATED this 31 day of October, 1989.

RICH COUNTY ATTORNEY

George W. Preston

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing **BRIEF OF PLAINTIFF - RESPONDENT** to Glen J. Ellis, Attorney for Defendant and Appellant at 60 East 100 South #102, P.O. Box 1097, Provo, Utah 84603 on this 30 day of October, 1989.



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APPENDIX 1

77-35-29. Rule 29 — Disability and disqualification of a judge or change of venue. (a) If, by reason of death, sickness or other disability, the judge before whom a trial has begun is unable to continue with the trial, any other judge of that court or any judge being so assigned by the chief judge of the judicial council, upon certifying that he has familiarized himself with the record of the trial, may, unless otherwise disqualified, proceed with and finish the trial; but if the judge so assigned is satisfied that neither he nor another substitute judge can proceed with such trial, he may, in his discretion, grant a new trial.

(b) If, by reason of death, sickness or other disability, the judge before whom a defendant has been tried is unable to perform the duties required of the court after a verdict of guilty, any other judge of that court or any judge being so assigned by the chief judge may perform those duties.

(c) If the prosecution or a defendant in any criminal action or proceeding shall file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposing party to the suit, such judge shall proceed no further therein until the challenge is disposed of. *Every such affidavit shall state the facts and the reasons for the belief that* such bias or prejudice exists and shall be filed as soon as practicable after the case has been assigned or such bias or prejudice is known. No such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.

(d) If the challenged judge questions the sufficiency of the allegation of disqualification, he shall enter an order directing that a copy thereof be forthwith certified to another named judge of the same court or of a court of like jurisdiction, which judge shall then pass upon the legal sufficiency of the allegations. If the challenged judge does not question the legal sufficiency of the affidavit, or if the judge to whom the affidavit is certified finds that it is legally sufficient, another judge shall be called to try the case or to conduct the proceeding If the judge to whom the affidavit is certified does not find the affidavit to be legally sufficient, he shall enter a finding to that effect and the challenged judge shall proceed with the case or proceeding.

(e) If the prosecution or a defendant in a criminal action believes that a fair and impartial trial cannot be had in the jurisdiction where the action is pending, either may, by motion, supported by an affidavit setting forth facts, ask to have the trial of the case transferred to another jurisdiction.

If the court is satisfied that the representations made in the affidavit are true and justify transfer of the case, the court shall enter an order for the removal of the case to the court of another jurisdiction free from such objection and all records pertaining to the case shall be transferred forthwith to the court in such other county. If, based thereon, the court is not satisfied that the representations so made justify transfer of the case, the court shall either enter an order denying said transfer or order a formal hearing in court to resolve the matter and receive further evidence with respect to such alleged prejudice.

(f) Whenever a change of judge or place of trial is ordered all documents of record concerning the case shall be transferred without delay to the judge who shall hear the case.

APPENDIX 2

77-7-18. Citation on misdemeanor or infraction charge. A peace officer, in lieu of taking a person into custody, or any public official of any county or municipality charged with the enforcement of the law, may issue and deliver a citation requiring any person subject to arrest or prosecution on a misdemeanor or infraction charge to appear at the court of the magistrate before whom the person should be taken pursuant to law if the person had been arrested.

APPENDIX 3

77-7-21. Proceeding on citation — Voluntary forfeiture of bail — Information, when required. (1) Whenever a citation is issued pursuant to the provisions of section 77-7-18, the copy of the citation filed with the magistrate may be used in lieu of an information to which the person cited may plead guilty or no contest and be sentenced or on which bail may be forfeited. With the magistrate's approval a person may voluntarily forfeit bail without appearance being required in any case of a class B misdemeanor or less. Such voluntary forfeiture of bail shall be entered as a conviction and treated the same as if the accused pleaded guilty.

(2) If the person cited willfully fails to appear before a magistrate pursuant to a citation issued under section 77-7-18, or pleads not guilty to the offense charged, or does not deposit bail on or before the date set for his appearance, an information shall be filed and proceedings held in accordance with the Rules of Criminal Procedure and all other applicable provisions of this code, which information shall be deemed an original pleading: provided, however, that the person cited may by written agreement waive the filing of the information and thereafter the prosecution may proceed on the citation notwithstanding any provisions to the contrary.

APPENDIX 4

77-35-23. Rule 23 — Arrest of judgment. At any time prior to the imposition of sentence, the court upon its own initiative may, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense, or the defendant is mentally ill, or there is other good cause for the arrest of judgment. Upon arresting judgment the court may, unless a judgment of acquittal of the offense charged is entered or jeopardy has attached, order a commitment until the defendant is charged anew or retried, or may enter any other order as may be just and proper under the circumstances.

APPENDIX 5

GLEN J. ELLIS, #1514
JEAN B. ELLIS, #4976
Attorneys for Plaintiff
10 East 100 South, Suite 102
P.O. Box 1097
Provo, Utah 84603
Telephone: (801) 377-1097

9429B

IN THE FIRST CIRCUIT COURT
IN AND FOR RICH COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. REID ELLIS, Defendant.	AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION FOR CHANGE OF VENUE CRIMINAL NO. 89-CR-9

STATE OF UTAH,)
) SS
COUNTY OF UTAH.)

The undersigned in support of the Defendant, Reid Ellis' Motion for a change of venue on the grounds that he cannot receive a fair trial in Rich County deposes as follows:

1. My name is Wayne Parry. I reside at 750 South 69 West, Apartment 142, Pebble Creek Apartments in Provo, Utah.

2. I am nineteen (19) years old at the present time. From the time that I was fifteen (15) until I was eight [illegible] (18) years of age I resided in Garden City, Rich County, Utah.

3. I am well acquainted with Sheriff Dwayne [illegible] of Rich County and his department and am personally well familiar with the prejudice which Reid Ellis feels as an outsider being subject to arrest in Rich County.

4. When I lived in Rich County my parents managed a Camper World Camp Ground but I attended the Rich County High School.

5. On some eleven or twelve different occasions during the three years that I lived in Rich County I was subjected to harrassment by the sheriff and his deputies for no other reason than that I was a new comer in the community. He made it a matter of departmental policy to blame me for practically everything that went wrong in the county during the three years that I lived there. He would pull me over if he saw me driving on the streets, make me get out of my car and into the back seat of his patrol car and then would proceed to call me names, insult me, accuse me of various and sundry crimes and make threats that he was going to throw me in jail, that he was going to do this, that or the other to me, and personally threatened me with force and violence.

6. This occured not only on isolated incidents but as I have said on eleven or twelve separate and distinct instances, the only variable being the things he would charge me with each time he pulled over. One time he claimed that I had damaged a bunch of buildings, I knew nothing of the incident, told him I would take a lie detector test and told him that if he would tell me when and where the alleged offense occured I could account for my time.

7. On several occasions he pulled me over and accused me of dealing in drugs. On one occasion he accused me of breaking and entering a home.

8. He would never give me any specifics. He simply did it to harrass me and seemed to take great joy in harrassing me as a young person.

9. On one occasion myself and a friend were going to a movie in another city, he kept us there in his car haranguing and harrassing both of us and accusing us falsely of having committed various offenses until we were too late to even go to the show.

10. On another occasion he stopped us while we were in route to the junior prom at our high school, he intentionally held us up for in excess of two hours until we were late picking up our dates and the dance was practically over with when he finally let us go.

11. He constantly harangued me about the length of my hair. I told him that my hair style was none of his business.

12. The sad truth is, that of all the times he harrassed me and accused me, that Sheriff Cockayne never on any of the eleven or twelve occasions that I can draw to mind, ever did have any evidence of any wrong doing on my part nor apparently did he have any evidence since I was never charged on any of those occasions with any kind of an offense. In the three (3) years that I lived in Rich County I was never charged or found guilty or plead guilty to any offense of any kind by the Sheriff's Department. They seemed to just take great joy in roasting me because I was a new comer in the community and was not old enough to stand up for myself.

13. I am also personally aware that on another occasion a good friend of mine, Tony Jackson, who is also a late comer in the community was accused by Sheriff Cockayne and his deputy of harboring a fugitive named Bishop.

The sole basis for their accusations against Tony were that he knew the Bishop boy. The Sheriff broke into Tony's home without a warrant and he and the deputy proceeded to

severelly physically attack Tony. They broke three ribs and left him in jail for three (3) days without medical attention and they held him incognito until Mr. Bishop was picked up in another state.

14. On the question of bias against new comers in the community, Mr. Ellis is absolutely correct. I lived in Rich County for three (3) years and a person from outside the community is not given fair treatment and cannot expect to have a fair trial if it is known that they are not residents and long time residents of Rich County, he just will not have a chance.

DATED at Provo, Utah, this 19 day of January, 1989.

WAYNE PARRY

VERIFICATION

STATE OF UTAH,)
) SS
COUNTY OF UTAH.)

On the 19 day of January, 1989, personally appeared before me WAYNE PARRY, who by me being first duly sworn did depose and say that he is the Defendant in the above entitled action: that he has read the foregoing AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION FOR CHANGE OF VENUE and knows and understands the contents thereof and that the same is true of his own knowledge except as to matters stated therein upon information and belief and as to such matters he believes them to be true.

Subscribed and sworn to before me this 19th day of January, 1989.

My Commission Expires: 4/30/91

Lou Markham
NOTARY PUBLIC

Residing at: Cum, Utah

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION FOR CHANGE OF VENUE to

George Preston
Rich County Attorney
31 Federal Avenue
Logan, Utah 84321

by depositing the copies of the same into the United States Mail, postage prepaid, this 19 day of January, 1989.

ATTORNEY

GLEN J. ELLIS, #1514
DEAN B. ELLIS, #4976
Attorneys for Defendant
60 East 100 South, Suite 102
P.O. Box 1097
Provo, Utah 84603
Telephone: (801) 377-1097

9386B

IN THE FIRST CIRCUIT COURT, STATE OF UTAH
IN AND FOR RICH COUNTY, RANDOLPH DEPARTMENT

THE STATE OF UTAH, Plaintiff, VS. REID H. ELLIS, Defendant.	AFFIDAVIT IN SUPPORT OF MOTION FOR CHANGE OF VENUE CRIMINAL NO. 88-SM-9

STATE OF UTAH)
) SS
COUNTY OF UTAH)

The defendant, being first duly sworn, on his oath, deposes as follows:

1. I am the defendant named, and reside in Provo, Utah.

2. I do not believe that I could have a fair trial on the charges against me in Rich County; during the suppression hearing, I became aware of the presence in the back of the courtroom of about ten persons, all residents of Rich County. From their conversations it was immediately plain that they considered me guilty, without a hearing, simply because my family are owners of a lake cabin, and we do not reside in Rich County.

3. They refer to us as "summer people" and are highly biased against us, simply because we do not live in Rich County.

4. I intend to have a jury trial, and do not feel, based on this experience, and many others of my family over the

Dated this 21st of December, 1988.

Reid Ellis

Reid Harding Ellis

VERIFICATION

STATE OF UTAH,)
) SS
COUNTY OF UTAH.)

On the 21st day of December, 1988, personally appeared before me Reid Harding Ellis, , who by me being first duly sworn did depose and say that he is the Defendant in the above entitled action: that he has read the foregoing Affidavit in Support of Motion for Change of Venue, and knows and understands the contents thereof and that the same is true of his own knowledge except as to matters stated therein upon information and belief and as to such matters he believes them to be true.

Reid Ellis

Reid Harding Ellis

Subscribed and sworn to before me this 21st day of December, 1988.

Lori Markham

NOTARY PUBLIC

My Commission Expires:

4/30/91

Residing at: Orem, Utah

APPENDIX 6

GLEN J. ELLIS, #1514
DEAN B. ELLIS, #4976
Attorneys for Defendants
60 East 100 South, Suite 102
P.O. Box 1097
Provo, Utah 84603
Telephone: (801) 377-1097

9278B

IN THE FIRST CIRCUIT COURT, RICH COUNTY
STATE OF UTAH, RANDOLPH DEPARTMENT

THE STATE OF UTAH,	)	APPEARANCE, PLEA AND
Plaintiff,	)	WAIVER OF SERVICE
VS.	)	
REID H. ELLIS	)	Cr. No.
Defendant,	)	
and	)	
VS.	)	
MARK T. LEFEVRE,	)	Cr. No.
Defendants	)	Judge Perry

Come now the Defendants by and thru Counsel, and make a voluntary appearance in the above cases, Waive the service of Summons, and enter a Plea of Not Guilty to all charges.

Defendants have received a copy of un-numbered Informations, filed by the County Attorney herein on or about October 26, 1988, also they have received copies of Tickets numbered 2403 and 2404, which were issued returnable to the JP Court in Randolph, and on which they were arraigned October 14, 1988 before Judge Ray Cox. In the JP court they waived the filing of formal Informations, plead "Not Guilty" to all charges, and were released on Bail.

Inasmuch as the Sheriff of Rich County still refused to release Defendants, (though ordered released by the JP on their own Recognizance.) on the Sheriff's insistence that he was

were not filed until October 26th or thereabout), Judge Perry was contacted, he approved Bail, and defendants are at this time free on $1,000 bail each.

The Clerk has given Counsel a Trial Date of December 13, 1988, at 1:30 PM. Waiving the informalities, defendants will, unless otherwise instructed by the Court, appear at that time for trial.

At the same time the Defendants will also appear on their Motions to Suppress and To Dismiss, and will request sanctions for failure to cooperate in Discovery.

Dated this 22 nd of November, 1988.

Glen J. Ellis, Attorney for Defendants.

MAILING CERTIFICATE

Mailed a copy of the foregoing APPEARANCE, WAIVER AND ENTRY OF PLEA to George Preston, Rich Co. Attorney, Box 402, Randolph, Utah 84064, and to 31 Federal Avenue, Logan, Utah 84321, attorney for Plaintiff, postage prepaid, this 22nd day of November, 1988 by depositing the same in the United States Mail.

Attorney